THE RIGHTS AND OBLIGATIONS OF THE RESPECTIVE PARTIES TO AN ACTION WHEN A DEPOSITION CAUSED TO BE TAKEN BY ONE PARTY IS READ AT THE TRIAL BY THE ADVERSE PARTY.

THE RULE IN THE FEDERAL AND STATE COURTS.

A DEPOSITION, which has been filed in a court, may be introduced in evidence by either party to an action pending therein, and the party who has caused the deposition to be taken not only does not vouch for the witness who made the deposition, but may even impeach said witness' credibility, if the deposition be read, not by the party who has caused it to be taken, but by the adverse party.[1]

This proposition is supported by the authority of eminent writers upon the law of evidence and by the decisions of many of our State courts.

Professor Wigmore, in his work on evidence, discusses the point as follows:[2]

> "It is generally conceded that where a deposition is taken at A's instance, B having notice and opportunity to cross-examine, A's failure to read the deposition as evidence leaves B nevertheless entitled to use it (post, Sec. 1389), on condition that he put in the whole, both the direct and the cross examination (post, Sec. 1893, and Sec. 2103). If A had read the deposition, in whole or in part, he would clearly have made the witness his own, and B's subsequent use of it would (on the principle of the preceding section) not prevent B from impeaching the deponent. But the difficulty is, where A, the taker, has made no use of the depositions, that he can hardly be said to have made the witness his own (ante, Sec. 910); indeed, his failure to use them is generally due to the discovery that the witness' testimony is unfavorable, and is practically a repudiation of it; his taking the deposition was thus a mere unsuccessful

[1] 40 Cyc. 2563; 21 L. R. A. 430, Note.

[2] WIGMORE, EVIDENCE, §§ 912 and 913b.

voyage of discovery, and the first and only person to utilize the deposition as testimony is B; the witness therefore is B's; and this must be so, whether the evidence he especially desires occurs in the answers to the direct or to the cross examination; accordingly, B may not impeach him.

"But where A has not read it, and B first puts it in as testimony, it would seem that the deponent has never been made A's witness (for the reasons already noted in Sec. 912), and therefore that the rule has never come into force against him and that he is at liberty to impeach the deponent. This result is further corroborated by a group of early rulings (no longer of force since the abolition of disqualification by interest), in which it was held that A, the taker of a deposition not using it, could as against B, the opponent desiring to use it, enforce the objection that the deponent was by interest disqualified as a witness for B."

The same doctrine is presented in Jones on Evidence[3] wherein the author says:

"When a person uses the deposition of the adverse party he thereby makes the testimony his own and is estopped from claiming that the portion read is incompetent evidence; and the party who has taken the deposition may object to his interrogatories, if the deposition is used by the adversary. So it has been held that one who has taken a deposition which he does not use is not debarred from introducing evidence to impeach the witness, if the deposition is used by the other party."

A similar statement of this principle may be found in Greenleaf on Evidence.[4]

The Illinois Appellate Courts have unequivocally approved the rule.

"The deposition of Dr. Haering, though taken by plaintiff below, was introduced in evidence by the defendant. He was therefore not a witness of the plaintiff, but that of her adversary. She had as much right to contradict him, if she could, as any other witness introduced by the defendant.[5]

"A party taking a deposition may, in his discretion, abandon it on the trial. In this condition the opposing party may use

[3] Sec. 685 (2nd Ed.).

[4] 9 Ed. Sec. 444-a (Editorial Note).

[5] Bloomington *v.* Osterle, 139 Ill. 120, 123.

it, if he desires. When he does use it, he is bound by it to the same extent as any other evidence he proffers. It is also subject to the same objections as would be proper if such opposing party had taken the deposition in the first instance on his own behalf; the other party having the same right of objection in every respect, even to the impeachment of the witness." [6]

The rule has been stated by other courts in substantially the same manner as follows:

"The next objection is, that the court permitted the complainant to examine witnesses to prove that Wallace, whose deposition had been read, was unworthy of belief. The deposition of Wallace had been taken by the complainant, but was not read on her behalf, but her counsel refused to read it, whereupon the defendant's counsel read the deposition to the jury, as evidence for him. Complainant then introduced several witnesses and offered to prove that Wallace was unworthy of credit. To proof impeaching this witness on the part of the plaintiff, the defendant objected, alleging that he was the complainant's own witness, and that she could not lawfully impeach him; but the court overruled the objection and permitted the witness to be examined.

"We think Wallace cannot be regarded as the complainant's witness. She was not bound to use the evidence after the deposition was taken. She did not, by introducing him before the jury, stand pledged that he was worthy of credit. We do not perceive that the case differs in principle from the case of witness, who may be summoned and sworn in a cause but not examined by the party summoning him. If such witness be afterwards examined by the other party, he makes him his own witness, and subjects him to all the rules of evidence applicable to such relation." [7]

"Here the trial court reversed the rule of the statute, overlooking, obviously, the elementary principle that a deposition or examination taken out of court does not become evidence for a party taking it, or any party to the cause till

[6] Penn. R. R. Co. *v.* Anda Co., 131 Ill. 426, 430. See also to the same effect, McCormick *v.* Laster, 81 Ill. App. 316, and Adams *v.* Russell, 85 Ill. 285.

[7] Richmond *v.* Richmond, 10 Yerg. (18 Tenn.) 343, (1837). The above paragraph was quoted with approval in Elliott *v.* Schultz, 29 Tenn. 234. see also Saunders *v.* R. R. Co., 99 Tenn. 144.

offered and received as evidence, and that it is then evidence only for the party who offers it. In all cases where a party offers in evidence a deposition taken by the opposite party, he makes it his own evidence; the latter can then object to his own interrogatories therein, the same as if propounded by the former, and can object to the competency of the witness the same as if the deposition were taken for his adversary." [8]

"When one party to a suit offers testimony taken by the other, he thereby adopts the witness as his own, vouches for his credibility, and must, in all things, submit to the same intendments and rules, as if he had first sought to make him a witness." [9]

"Depositions taken in the ordinary way by a party and filed may be read by the other party. *Collier* v. *Jeffreys,* 2 Hay., 400.. Nor does the taking of the deposition make him the witness of the party taking it. This is so held in *Neil* v. *Childs,* 10 Ired., 195." (*infra*)[10]

"The plaintiff in making the defendant his witness, while not bound by his testimony, vouched for his credit. 1 Greenl. Ev., Sec. 442; *Coulter* v. *American Merchants Union Express Co.,* 56 N. Y. 585. As the same rule applies where one party reads the deposition of a witness taken on behalf of his opponent (*Richmond* v. *Richmond,* 10 Yerger, 343), as the witness thereby becomes the witness of the party reading the deposition. *Cudworth* v. *Ins. Co.* 4 Rich. (Law) 416." [11]

The precise question under discussion has never been passed upon by the courts of the State of New York, but one, very similar in nature, was decided by the Court of Appeals in *Fall Brook Coal Co.* v. *Hewson.*[12] In that case, the defendant called a witness and asked him several questions which are not material to the issues and then excused him. The plaintiff later called the

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[8] JONES, EV. SEC. 703. Maldaner *v.* Smith, 102 Wis. 30, 40 (1899). See also Smith *v.* State, 145 Wis. 612, 615.

[9] Jewell *v.* Center, 25 Ala. 498; Fountain's Admr. *v.* Ware (1876), 56 Ala. 558, 560. See also Jewell *v.* Center, 25 Ala. 498, 504 (1880) and Herring *v.* Skagg, 73 Ala. 446, 453.

[10] Strudwick *v.* Brodnax, 83 N. C. 401, 404 (1880).

[11] Bensberg *v.* Harris, 46 Mo. App. 404 (1891). Other decisions, essentially in accord are: Hatch *v.* Brown, 63 Me. 410, 416; *Re* Smith, 34 Minn. 436, 439; Cudworth *v.* So. Car. Ins. Co., 32 S. C. Law (4 Rich.) 416.

[12] 158 N. Y. 150.

same witness who then gave material testimony in favor of plaintiff. The defendant was permitted by the trial Court to discredit the witness by the testimony of other witnesses. Plaintiff's exception to this ruling was the basis of the appeal. Chief Judge Parker, speaking for the Court, says:[13]

> "Greenleaf on Evidence (Vol. I, Sec. 442) states the reason for the rule as follows: 'When a party offers a witness in proof of his cause, he thereby, in general, represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces; and having thus presented them to the court, the law will not permit the party afterwards to impeach their general reputation for truth, or to impugn their credibility by general evidence tending to show them to be unworthy of belief. For this would enable him to destroy the witness if he spoke against him, and make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him.' (See, also, Wharton on Evidence, Sec. 549.) The rule being established beyond change, save by legislative enactment, that one cannot impeach his own witness, the question presented here is whether Wilson became the defendant's witness within the meaning of the rule. Would he have become such had his name been simply called without administering the oath? If not, would he have become such through the additional act of administering the oath? If the propounding of questions be also necessary, would an inquiry as to his name and residence have made him the party's witness in such a sense that he would be bound to support his character from the beginning to the end of the trial, or would that have happened only upon some question being asked him material to the issues on trial?"

and after reviewing several English cases, continues:[14]

> "The general view upon which these cases proceeded is that a party does not necessarily make a person his witness by merely calling and swearing him, and we are not able to discover any good reason for disagreeing with them. On the contrary, it seems to us that the rule is not properly applicable, save in cases where a party attempts to elicit from

[13] At page 152 of the opinion.

[14] On page 155.

a witness called to the stand, testimony material to issues upon trial; that until such an attempt is made, the party has done nothing that can by any possibility affect the trial either to his own benefit or to the harm of his opponent, and, therefore, he has offered a witness in proof of his cause and is not within the reason of the rule that burdens him with the necessity of supporting the character of the witness to the end of the trial. His mistake, however caused, has not harmed the other party and the interests of justice can in nowise be promoted by permitting that other party to take such advantage of the mistake as will fasten upon his opponent the responsibility of vouching for the character of a witness actually hostile and from whom he has not attempted to secure any proof in the cause."

It is submitted that there is no difference in principle between the Fall Brook Case and a case wherein a party is allowed to impeach a witness, whose deposition he has taken, if said deposition be read by the adverse party. It is inconceivable that the Courts of New York, when this question shall be presented, can, without doing violence to all principles of logic, adopt any course other than to apply the rule of the Fall Brook decision. The courts of other jurisdictions in every instance in which the question has been before them have felt compelled to take this precise step, as the following paragraphs quoted from the decisions of several different tribunals bear witness:

"The use of a deposition by one party, taken by the other, gives it no different status in the case than the evidence of a party, or of a witness called into the court in his behalf, when called to the stand by his opponent. *Hazelton* v. *Union Bank,* 32 Wis. 34." [15]

"If the plaintiff in a suit take a deposition and file it, and upon the trial of the case declines to read it, it has been settled by this court that the defendant has the right to read the deposition. So if a plaintiff have a witness summoned and have him in court and actually have him sworn, but then declines to examine him, and the defendant examines him, whose evidence is it? Is it the plaintiff's or the defendant's? The evidence is not before the jury until the deposition is read, or the witness is examined, and the party

[15] Maldaner *v.* Smith, 102 Wis. 30, 40 (1899).

who examines the witness thereby makes him his witness. (*Hidgen* v. *Hidgen,* 2 A. K. Mar. 42.)" [16]

"The reason for not allowing a party to impeach his own witness, by showing his general character to be bad, is, that he shall not be heard to say, that he attempted to impose on the jury, by calling a witness, whose general character is known to be bad; but this reason does not apply to the exclusion of declarations made on other occasions, and by which, the party, calling the witness, might have been deceived. The question is one of some interest, but we are not called on now to decide it, as it does not arise in this case, for a party does not make one his witness by taking his deposition, which he declines to read, or by having a witness subpoenaed, and then declining to examine him." [17]

"The deposition, when filed, stood as a witness summoned. The party summoning the witness would not be bound to examine him, yet the other party might introduce him, making him his own witness thereby, so with the deposition. *Richmond* v. *Richmond,* 10 Yerg. 343, 346." [18]

Moreover, the scope of the rule in the Fall Brook case is, by Sections 881 and 883 of the Code of Civil Procedure,[19] extended to include the depositions of witnesses filed in court. The sections of the Code of Civil Procedure referred to, in substance provide that a deposition of a witness may be read in evidence by *either* party to an action at the trial thereof, and that a deposition so read has the same effect, and no other, as the oral testimony of the witness would have, and that the objection to the competency or the credibility of the witness may be made as if the witness were then personally examined.

There are no decisions by the United States Courts squarely in point, but some cases decided by the Circuit Court of Appeals are pertinent and not inharmonious with the rule.[20]

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[16] Musick *v.* Ray, 3 Met. (Ky.) 427 (1861).

[17] Neil *v.* Childs, 32 N. C. 195.

[18] Brandon *v.* Mullenix, 58 Tenn. 446, 448 (1872).

[19] New York.

[20] Scherer *v.* Everest, 168 Fed. 882 (C. C. A.-8th Circ.) 826; Crothy *v.* Great Western Ry. Co., 169 Fed. 593. (C. C. A.-8th Circ.); Central Co. *v.* Penny, 173 Fed. 340. (C. C. A.-8th Circ.); Bernhardt *v.* City & S. Ry. Co., 263 Fed. 1009 (Ct. Appeals, Dist. Col. 1920).

In *Scherer* v. *Everest*,[21] the Court said at page 826 of the opinion:

> "The trustee took the deposition of one Elwood, one of the officers of the Decatur Company, but did not introduce it in evidence. The claimants offered in evidence a portion of this deposition, and the referee and the court below ruled it out on the ground that the claimants could not introduce arbitrarily any part of the deposition, and on the further ground that the attorneys for the trustee attempted to verify the statements in it, but the witness refused to produce and permit them to introduce books and papers which they demanded. But this was a witness called by the trustee. He took his deposition. After it was taken and returned to the court, it was at the command of either party in the controversy. The fact that the trustee elected not to compel his witness to produce the books and papers for which he called cannot deprive the claimants of the benefit of the evidence which the witness actually gave. The testimony offered by the claimants was relevant and material to an important issue in this controversy, and it should have been received. If that testimony was contradicted or modified by other parts of the deposition, it was the right and the privilege of the trustee to put those parts in evidence. When the taker of a deposition fails or refuses after its return to put it in evidence, the opposing party may introduce all or a part of it, and the taker may then put in evidence any part not introduced by his opponent. *Jones on Evidence* (2d Ed) Sec. 685; *Hale* v. *Gibbs*, 43 Iowa, 380; *Calhoun* v. *Hays*, 8 Watts & S. 127, 42 Am. Dec. 275; *Converse* v. *Meyer*, 14 Neb. 190, 192, 15 N. W. 340; *Town of Ansonia* v. *Cooper*, 66 Conn. 184, 33 Atl. 905, 908."

Bernhardt v. *City & S. Ry. Co.*[22] is the latest pronouncement of a federal court upon the subject. The following is quoted from the opinion of Chief Justice Smyth:

> "The deposition of one Richards was taken in another case, and it was stipulated between the parties to the cases before us that it might be read in those cases 'the same as if it had been originally taken for that purpose'. The plaintiffs refused to read it at the trial. Thereupon counsel for

[21] *Supra.*
[22] *Supra.*

> the defendant offered to read certain parts of it. Plaintiffs objected, on the ground that, if the defendant desired any part of it, the whole would have to be read. The court ruled that the entire deposition must be read, but as the testimony of the plaintiffs. In this we think there was error. Counsel for the company had a right to read as a part of his own case so much of the deposition as he desired, which was not clearly fragamentary and misleading, and thereupon it became the right of the plaintiffs to present so much of it as had a tendency to explain or contradict what had been read by the defendant; in other words, so much as would have been proper as cross-examination, if the testimony had been given by the witness upon the stand, instead of through a deposition."

From the foregoing, it will be noted that in eleven State jurisdictions of the United States, the doctrine stated in the first paragraph of this article unquestionably is law. Furthermore, so far as diligent search has revealed, no Court in this country has repudiated that doctrine.

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